IN THE SUPREME COURT OF IOWA

NO. 17- 1599
GRIEVANCE COMMISSION NO. 819

IOWA SUPREME COURT ATTORNEY DISCIPLINARY BOARD,
Complainant-Appellee,

vs.

MARK T. HAMER,
Respondent-Appellant.

APPEAL FROM THE GRIEVANCE COMMISSION
OF THE SUPREME COURT OF IOWA

APPELLANT'S BRIEF

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MARK HAMER

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ROUTING STATEMENT

As this is a matter regarding attorney discipline, it must be retained by the Iowa Supreme Court. Iowa Ct. R. 35.10.

STATEMENT OF THE CASE

This is an attorney ethics case involving the Respondent Mark T. Hamer. Mark Hamer's longtime client and friend Doug Paul first filed a complaint with the Attorney Discipline Board on February 18, 2013, related to investments and loans Doug Paul was involved in with Mark Hamer between 2004 and 2006. (App. Vol. 1, p. 7) The Board filed a formal complaint in this matter on September 30, 2015 (App. Vol. 1, p. 14). A hearing was held before the Grievance Commission panel on March 14-16, 2017. The Commission issued its Findings of Fact, Conclusions of Law, and Recommendation, on October 4, 2017 (App. Vol. 1, p. 97). The findings found Mark Hamer had violated the rules of professional conduct and recommended a suspension as a sanction. Mark Hamer timely filed an appeal of the Commission's findings.

STATEMENT OF FACTS

Attorney Mark Hamer ("Hamer") and elite businessman Dr. Douglas Paul ("Paul") formed a very close personal friendship and created a very successful professional relationship over many years. Paul was a client of Hamer from 1989 until 2007. Prior to their professional relationship, Paul was a sophisticated and successful businessman. Paul received his Masters and PhD in Education from the University of Iowa in 1981 and 1983, respectively. (App. Vol. 1, p. 230). His doctoral dissertation in instructional design was regarded as brilliant by the dissertation committee.

Prior to Paul's relationship with Hamer, Paul was engaged in private financing and banking. His knowledge of the field was demonstrated prior to hiring Hamer as his attorney. In 1988, Paul arranged the investment and exit of $350,000.00 from Anne DeLong in his Profiles Corporation. Throughout the entire process Paul was not represented by an attorney or a CPA. Paul coordinated the entirety of the project. (App. Vol. 4, pp. 350-352). Hamer was not involved with this investment in any capacity.

Over the course of several years, Hamer and Paul were involved in what Paul classified as "private banking". Notably, in 2004 Hamer assisted

Paul in navigating the enormously successful sale of Paul's primary businesses, Buckle Down Publishing Company and ZAPS Learning for more than $27,500,000.00. Thereafter, at Paul's request, Hamer and others presented him with various business opportunities. Approximately 25 of these investment opportunities came in the form of private loans Paul would make to people/entities in unique circumstances whereby they did not want to pursue traditional lending avenues. Some of these opportunities carried high-risk and high-reward. The opportunities presented by Hamer resulted in Paul earning more than $1,000,000.00 in earnings from these loans in a period of only two years. During this time period, Paul would continue to spend countless hours with Hamer, both at his office, home, and in social situations.

In August of 2004, Andy Meardon, the son of one of Hamer's law partners and a personal friend of Paul's, presented an investment opportunity to Paul, Hamer, and others, with Unified Worldwide Transport, LLC ("UWT"). (App. Vol. 4, pp. 338-341). After personally reviewing the company's financial statements, directly communicating with the company's two primary representatives, Gail Howard ("Howard") and James Jedynak ("Jedynak"), and researching all aspects of the company, Paul made the decision he would invest in the company. Through 2006, Paul made several

investments in the company and even coordinated loans with the company, CEO, Gail Howard ("Howard"). It was ultimately determined that UWT was a fraud, and that more than 100 investors, including both Paul and Hamer, were defrauded out of more than $30,000,000.00. Both testified for the United States government against these criminal defendants. The federal court sentenced both to jail for a combined 13.5 years.

Paul immediately pursued legal actions against UWT, and secured a judgment against UWT in the amount of $2,150,000.00 plus interest and costs in May, 2007. Paul also secured monetary judgments against Howard and Jedynak. Not satisfied, Paul turned his anger toward Hamer.

Paul waited until February, 2013, to lodge a complaint against Hamer with the Iowa Supreme Court Attorney Disciplinary Board. Paul, the lone witness for the Board, testified before the Commission. Paul went to great lengths to suggest that Hamer kept him in the dark about the details of all transactions; that he was merely a passive participant in Hamer's schemes.

After the evidence was received and evaluated, it became clear that Paul's testimony was not credible, he admitted the same. He was an intelligent, savvy businessman, who was meticulously involved in all aspects of these transactions. Although Paul sought to prove that Hamer's motives were corrupt, he had no evidence demonstrating the same. It was clear

Paul's main objective was to harm Hamer; the truth being optional in that quest.

Hamer filed a comprehensive letter responding to the complaints of Doug Paul. The letter and multiple attachments amounting to several hundred pages provided a detailed account of each and every loan mentioned in the complaint. The letter was supported by substantial documentary and factual evidence. (App. Vol. 1, p. 182). It is necessary to read the entirety of Hamer's response to gain a better understanding of Hamer and Paul's truly unique professional and personal relationship.

ARGUMENT

I. A FINDING OF ETHICAL VIOLATIONS IS NOT SUPPORTED BY THE EVIDENCE ON RECORD

Error Preservation: This matter is fully preserved in the Stipulation, Board's Exhibits, Grievance Commission hearing transcript, and the Commission's Findings of Fact, Conclusions of Law and Ruling.

Scope and Standard of Appellate Review: The Court reviews attorney disciplinary proceedings de novo. *Iowa Supreme Court Attorney Disciplinary Board v. Parrish*, 801 N.W.2d 580, 583 (Iowa 2011). The appropriate discipline in a particular case turns on the nature of the alleged violations, the

need for deterrence, protection of the public, maintenance of the reputation of the profession as a whole, and the Respondent's fitness to continue in the practice of law. *Iowa Supreme Court Board of Prof'l Ethics & Conduct v. Freeman,* 603 N.W.2d 600, 603 (Iowa 1999).

There is no standard discipline for a particular type of attorney misconduct. *Iowa Supreme Court Board of Prof'l Ethics & Conduct v. Hohenadel*, 634 N.W.2d 652, 655 (Iowa 2001). The form and extent of any sanction must be tailored to the specific facts and circumstances of each individual case. *Iowa Supreme Court Attorney Disciplinary Board v. Marks*, 759 N.W.2d 328, 332 (Iowa 2009). The Court is, however, concerned with maintaining some degree of consistency throughout disciplinary cases. *Iowa Supreme Court Attorney Disciplinary Board v. Clauss*, 711 N.W.2d 1, 4 (Iowa 2006).

ARGUMENT

A. The Commission's decision is self-contradictory as it relies solely on the testimony of Doug Paul despite the Panel's finding that Paul was not a credible witness.

The Commission relied exclusively on the testimony of Doug Paul in finding that Mark Hamer had committed ethical violations while simultaneously finding Paul's testimony was not credible. The Commission's findings are necessarily self-contradictory. Given that Paul was the only

witness to testify on behalf of the Board, there is a complete lack of credible evidence sustaining the Commission's findings of ethical violations. It follows that the findings should not be upheld.

An evidentiary hearing was held in March 2017 before the Grievance Commission panel. The Board's allegations against Mark Hamer were supported solely by the testimony of Doug Paul. It is uncontroverted that Doug Paul was not a credible witness. Further, the Commission's decision repeatedly acknowledges that Paul's testimony was not credible.

The Grievance Commission is uniquely situated to weigh the credibility of witnesses before the panel. The Iowa Supreme Court has routinely noted they give special deference to the credibility findings of the Commission. "We give respectful consideration to the findings of the commission, especially when considering credibility of witnesses, but are not bound by them." See, e.g., *Iowa Supreme Court Attorney Disciplinary Bd. v. Moothart*, 860 N.W.2d 598, 602 (Iowa 2015). The Commission is the only party with the ability to adequately assess the demeanor and the credibility of testimony on a firsthand basis.

The Commission noted that Doug Paul's testimony was inconsistent on multiple occasions. (App. Vol. 1, pp. 131-132). The Commission also noted that Doug Paul's testimony lacked credibility. (App. Vol. 1, p. 114). The

finding that Paul was not a credible witness is well supported throughout the record. The following is a brief sample of the highly inconsistent and incredible testimony provided by Doug Paul:

> **Paul's Initial Testimony**: At this hearing, Paul testified that he relied on Hamer for his investment advice. (App. Vol. 4, p. 350)
> **Reality:** In prior sworn deposition testimony in his lawsuit against KKJ (Jedynak), Paul testified that Hamer did not "give him any type of counsel or advice with respect to investments."
>
> **Paul's Initial Testimony**: Paul testified that Hamer handled ALL the communications with UWT. (App. Vol. 4, pp. 359-360).
> **Reality:** When confronted with various emails and correspondence letters, incontrovertible proof, Paul had to recognize his testimony was false and misleading. (App. Vol. 4, p. 382). As with much of his other blatantly false testimony, upon being confronted, Paul backtracks his prior testimony and attempts to elude the fact he provided intentionally false and misleading testimony. (App. Vol. 4, p. 382). (My prior testimony "was accurate" until a certain date. Of course this testimony was exposed as false also (App. Vol. 4, p. 384).
> As troubling as the idea that Paul would walk into a court-setting, take the oath, and testify that he had no communication with the UWT people independent of Hamer, is the scope and breadth of the independent communications he did have. (App. Vol. 4, pp. 381-388). Not only did Paul have extensive, ongoing, and consistent communication with UWT's CEO Gail Howard, he communicated with her about specific banking matters for which he now feigns ignorance and unfamiliarity with. Specifically, Paul discussed and negotiated loans, donations, and interest rates. The fact that Paul provided Gail Howard with very detailed and informed interest rate advice with regard to the loan they were discussing is especially troubling when absorbed in light of all his prior testimony about being a passive victim. More, and in keeping with his modus operandi when proven to be fabricating evidence, Paul attempted to minimize and elude by suggesting Howard asked him about interest rates and he merely "Googled it." The absurdity of this equivocation is not only evident from the context of the emails he was confronted with, but by

a simple application of rational common sense. (App. Vol. 4, pp. 385-388)

Paul's Initial Testimony: Paul testified that he did not review any documents regarding UWT. Specifically, Paul stated "[W]hat I was reviewing was newspaper articles and clippings about the field, as opposed to specific business." In responding to the question whether or not he looked at the business, Paul said, "No." More than that, Paul expressly testified that he did not look at any financials from UWT. (App. Vol. 4, pp. 360-361).

Reality: Confronted with uncontradictable documented evidence, including his own prior statements, Paul was compelled to admit that he had in fact reviewed all variety of the UWT financial documents. (App. Vol. 4, pp. 380-381). The following testimony not only invalidates his prior testimony on this issue, it is indicative of the shifting nature of the honesty of his testimony as a whole:

Q: Its inaccurate for you to sit here and testify you didn't evaluate any financial documents of UWT, isn't it?

A: Yes.
(App. Vol. 4, p. 381)

Paul's Initial Testimony: Paul expressly testified that Hamer had created the contractual documents between Paul and UWT. (App. Vol. 4, pp. 361-362).

Reality: Paul, confronted with the actual documents, was forced to admit that Hamer did not author these documents. These documents were authored by UWT's legal counsel in California. (App. Vol. 4, pp. 362-363).

Paul's Initial Testimony: Paul testified that the opportunities he outlined in his testimony were all brought to him by Hamer. (App. Vol. 4, pp. 370-371).

Reality: Getting no further than the first opportunity, Paul was forced to recognize that originated with Hamer's law partner, Jim McCarragher. However, the deception in his testimony did not stop there. As previously indicated, the UWT investment was not presented by Hamer, it was presented by Andy Meardon. Mr. Meardon was a key witness in the criminal prosecution associated with UWT, and expressly identified as the individual who recruited investors in Iowa.

Paul's lack of credibility was also exposed by the complete compromise of his allegations on certain claims. By the end of Paul's cross-examination, he was compelled to admit two material and relevant certainties in this case: (1) Hamer was not, and is not, responsible for the UWT investments Paul made; and (2) Paul netted over $1,000,000 on the private banking transactions that Hamer presented him with. (App. Vol. 4, pp. 390, 394). Most telling was Paul's abandonment of his claims and criticism against Hamer over UWT:

> *Q: For the convenience of today, and to hurt Mark, you testified something different, didn't you?*
>
> *A: It's your testimony, not mine.*
>
> *Q: I'm not going to argue with you. It's your testimony.*
>
> *A:* ***Mark Hamer is not responsible for the UWT fiasco, that was the insiders at UWT responsible for that.***
>
> (App. Vol. 4, p. 390) (emphasis added).

It cannot be argued that Paul's testimony was credible in the slightest. The Commission did not find that Paul was credible. In fact, the Commission appropriately noted that Paul's testimony lacked credibility and was inconsistent in several respects. (App. Vol. 1, pp. 114, 131-132). Despite the lack of credibility, the Commission erred by placing great emphasis and weight on the testimony of Doug Paul. The reliance belies their own findings.

The reality is there was not any credible evidence supporting any of the Board's allegations. It is the duty of the Board to prove violations by a convincing preponderance of the evidence. *Iowa Supreme Court Attorney Disciplinary Board v. Nelson*, 838 N.W.2d 528, 532 (Iowa 2013). The only witness appearing for the Board was Doug Paul. No other party involved with any of these loans was called to testify. The only evidence supporting the Board's complaint is not credible. The Board's burden is higher than that of a traditional civil trial. *Id.* The Board fell woefully short of their burden.

The Commission's conclusions of law must be based on their findings of fact. Their opportunity to evaluate the witnesses before them allowed them to determine firsthand that Doug Paul was not a credible witness. The Commission's conclusion that Hamer engaged in ethical misconduct directly contradicts their finding concerning Paul's credibility. The conclusion should accordingly be overturned.

B. Hamer's testimony was credible and consistent at every phase of litigation.

Mark Hamer's testimony at the Grievance Commission hearing was credible. In a stark contrast to the testimony of Doug Paul, Hamer's testimony was consistent throughout the hearing. Further, the testimony at the hearing

was uniformly and wholly consistent with every statement and response Mark Hamer has filed throughout the pre-hearing process. Hamer's consistent and credible testimony is uncontroverted by any credible evidence. For these reasons the allegations against Hamer should be dispelled and dismissed in their entirety.

A stark contrast can be found between the incredible and inconsistent testimony of Doug Paul and the repeatedly validated and consistent testimony of Mark Hamer. The consistent responses began with Hamer's initial response to the complaint in May 2013. (App. Vol. 1, p. 182). The responses were unwavering from that time until the time of hearing in March 2017 with regards to several key aspects.

First, Hamer provided credible testimony regarding his relationship with Paul. Paul and Hamer were fast friends that would spend hours together. They would eat lunch together at least two to three times a week. They went to a football bowl game together, played golf, and conversed together often. In fact, the two had adjacent properties and would often spend hours socializing and talking about their work together around a bonfire. (App. Vol. 4, pp. 428-429). The reality is that the two were inseparable and would discuss every last detail as it related to their work together.

Additionally, Paul was wildly successful in the majority of his investments. "The 20 or 21 loans that were involved during that period in two years, he made over -- well over a million dollars" (App. Vol. 4, pp. 419-420, 450). Paul's expertise and intelligence as a private banker was readily apparent. Hamer described Paul as "an incredibly successful businessman" and "a sophisticated investor". (App. Vol. 4, p. 431). Hamer noted, "There are different kinds of clients that you develop in a community like Iowa City, and sometimes there are some very, very bright people. Doug was on the high end of that bright schedule, and he was a very engaging and active person". (App. Vol. 4, p. 428).

Hamer also presented far more credible testimony concerning Paul's awareness of transactions with Hamer's other clients. Hamer described Paul as "the most insightful and detailed individual as a client that I have met in my 46 years in practice. He paid attention to every single detail of every transaction that we ever did." (App. Vol. 4, pp. 431-432). If Doug Paul "signed anything, [he] read it and read it carefully". (App. Vol. 4, p. 445). This mirrors the testimony provided by Paul in a 2008 deposition verbatim – a deposition provided to the Board in May 2013. (App. Vol. 1, pp. 233, 242). Paul remained fully advised and received every necessary disclosure as he worked with Hamer on any project.

Finally, Hamer affirmatively testified, "we had discussions early, and we had discussions often about the attorney-client relationship, and about the conflicts . . . initially we were very careful about that, and I was very careful with him to understand that he could get other counsel, he could do whatever extent that he wanted to. He could get another attorney and he could go through the whole proceedings." (App. Vol. 4, pp. 459-460). "We had had conflicts before when I had been representing him, we had had conflict situations. We had walked through that before with him, and he understood exactly what we were talking about." (App. Vol. 4, pp. 459-470).

Hamer provided what Paul could not at the Grievance Commission hearing- credible and consistent testimony. Paul's fabricated version of events can easily be dispelled as incredible by such inconsistent testimony. Conversely, Hamer's version of events are thoroughly supported by documentation and have remained consistent since responding to the original complaint in 2013.

C. Hamer did not commit the violations alleged in Count I of the Board's complaint.

In Count I of its complaint the Board alleges Hamer engaged in an unethical conflict of interest by connecting clients with Doug Paul for private

loan transactions. The Board has failed to produce any credible evidence supporting the allegations in Count I of their complaint.

The Board outlines nine different loans made by Paul to Hamer's clients in their complaint. The complaint alleges the circumstances surrounding the loans constitute a breach of ethical rules concerning a conflict of interests between clients. There are two applicable rules of ethical conduct. For the loans occurring prior to July 1, 2005,[1] the Iowa Code of Professional Responsibility applies. The rules state:

> DR 5-105
>
> (C) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment on behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(D).
>
> (D) In the situations covered by DR5-105(C), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

The complaint also alleges ethical misconduct on a loan from Mr. Paul to Colorado Medical Supply in August 2005. The following ethical rule corresponding to DR 5-105 is found in Iowa Rules of Professional Conduct 32:1.7:

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[1] See Count I, Divisions A-H

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
> . . .
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
> 1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> (2) the representation is not prohibited by law;
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> (4) each affected client gives informed consent, confirmed in writing.

Regardless of which rule applies, the Board has failed to prove any violation of ethical misconduct. The Board's complaint must be dismissed.

i. Standards of Ethical Conduct

The rules of ethical conduct do not prevent the multiple representation of clients. Such a rule would be unnecessarily harmful to both clients and lawyers where two or more clients have exceedingly similar or aligned interests. The Iowa Rules of Professional Responsibility and subsequent Rules of Professional Conduct provide explicit comments detailing the same.

There are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation.

If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of his clients. Iowa R. Prof'l Resp. EC 5-16.

> The mere possibility of subsequent harm [to the client] does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Iowa R. P. Conduct 32:1.7 cmt. 8.

The Supreme Court has defined a two-step approach for determining whether an attorney has violated Rule 32:1.7(a)(2). *Iowa Supreme Court Attorney Disciplinary Bd. v. Willey*, 889 N.W.2d 647, 653 (Iowa 2017). First, it must be determined whether Mr. Hamer's representation of Mr. Paul would be affected by his responsibilities or representation of the other clients and vice versa. Second, it must be determined whether Mr. Hamer's representation of one client would be limited by the representation of another. The Rules both before and after July 1, 2005, provide comments intended to help attorneys navigate potential conflict of interest situations. Both sets of rules provide explicit commentary identifying situations directly analogous to the circumstances in the present matter. It cannot be said that Mr. Hamer's

representation of any client was materially limited by his representation of another client.

ii. All Parties had Similarly Aligned Interests

Hamer was not prohibited from representing any of the nine clients in helping them obtain a private loan from Paul. Under all relevant considerations, there was no likelihood Hamer would be subject to adverse influences affect his independent judgment on behalf of each client. Accordingly, no ethical misconduct occurred by connecting Mr. Hamer's clients as the borrowers to the lenders.

The highly unique and nuanced facts of this matter must be addressed to fully understand Hamer's relationship to both Paul the lender and his other clients the borrowers. Doug Paul is not an ordinary client in any respect. Paul is a highly intelligent, sophisticated, and detail oriented person. (App. Vol. 4, p. 428). He has been involved in well over twenty private loans in which he is the lender. While, Hamer has been involved in connecting Paul to various borrowers on about twenty-three separate occasions, Hamer was entirely uninvolved in several other of Paul's private loans. On at least five occasions Paul has found borrowers wholly independent from Mr. Hamer. (App. Vol. 4, pp. 352-355).

Remarkably, suggesting he is ignorant and uninformed in these affairs, Paul adopted legal contracts from prior transactions and amended them to conform to the new loans. (Acting as his own lawyer and closing agent on these loans). Two of these loans, to WAM #2 and Financial Dynamics, were made exclusively to Paul's friend Andy Meardon.

Paul can only be classified as an expert in the highly complex field of private lending. Paul provided sworn testimony that he has never been provided investment advice from Hamer. (App. Vol. 2, p. 383). This testimony was corroborated by Hamer. (App. Vol. 4, p. 451). Further, Paul was never billed for legal services in preparation of the loan documents. Those fees were appropriately assessed to the borrower. (App. Vol. 4, pp. 437-438, 477). Hamer did not negotiate loan terms on behalf of any borrower or Mr. Paul the lender. (App. Vol. 4, pp. 458-459).

When put in its simplest terms, Hamer's role connecting certain borrowers to lenders was not overly complex. Clients who had borrowing interest or needs obtained information from banks, accountants, financial advisers, or set their own parameters regarding the essential terms of a loan they wanted or needed. If they asked, Hamer would attempt to identify someone that might be willing to provide the loan on a private basis. On occasion Paul would end up being the person identified and the person who

agreed to serve as the private lender. Without negotiating terms, Hamer would connect the two parties. The result was time and time again a mutually beneficial result for all parties involved.

Former Iowa Supreme Court Justice Linda K. Neuman, one of Respondent's expert witnesses, outlined the relationship and interests between borrower and lender in her letter assessing whether any ethical infractions had been committed by Hamer. She stated:

> Hamer's facilitation of lending relationships between Paul and Hamer's (or the firm's) other clients appear to be the kind of non-litigation-related multi-client transactions that the pertinent ethical standards permit. They appear to involve relatively simple and straightforward promissory notes and corresponding payment schedules. The reasonableness of their terms should have been apparent to an experienced businessman such as Doug Paul. Although the parties' interests as lender and lendee were necessarily adverse, they were also mutually beneficial to the extent Paul desired investment and the individuals and small businesses needed capital. There is nothing in the documents I reviewed to suggest that Hamer favored one client over another. (App. Vol. 2, p. 386).

None of the representations Hamer engaged in were prohibited by the rules of ethical conduct primarily because of the mutually beneficial relationship and shared interests. The directly aligned and symbiotic interests of the parties presented no likelihood of adverse influence to Hamer's independent judgment. Further, this similar interests of the parties did not

create a situation where Hamer would be materially limited in his representation of another.

iii. Mr. Hamer made appropriate disclosures to all clients

The Board has not proven that Hamer engaged in a prohibited multi-representation of clients. The ethical rules do provide an exception allowing multi-representation even where a conflict exists. By providing the appropriate disclosure of information to all client and receiving their consent to proceed with representation, Hamer ensured he did not engage in ethical misconduct.

As a preliminary note, Hamer is not conceding that he engaged in the impermissible representation of two clients with a conflict of interest. (However, even if he did engage in such conduct,) Hamer provided the necessary disclosures and received the necessary consent making his multi-representation of clients ethical under the rules. These steps are extra-precautionary measures to ensure Hamer continued to provide ethical representation to all of his clients.

Prior to July 1, 2005, the ethical code did not require a written and signed informed consent in order to satisfy the requirements of DR 5-104(D). In the situations covered by DR 5-105 (C), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and

if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

In all but one of the complaints alleged in Count I by the Board, Hamer initiated his representation of his clients prior to July 1, 2005. Under these rules Hamer was not required to provide written disclosures and obtain signed consent forms in order to undergo representation of the clients. Hamer provided testimony that he disclosed to Paul his duty to disclose his attorney-client relationship with the borrowers and considerations under the ethical rules. Hamer further advised Paul that he could seek outside counsel in order to avoid any potential conflicts. (App. Vol. 4, pp. 459-460).

The lone complaint with allegations occurring after July 2005 in Division I, also contained the appropriate disclosures. The Board's own complaint quotes directly from written disclosures provided to the parties. The disclosure thoroughly outlined the potential conflicts of interest and advised that the parties should seek outside counsel. The disclosure was not unfamiliar to Paul who had worked with several of Mr. Hamer's clients over the years, and had, by his own admission, often been provided with a similar disclosure. (App. Vol. 4, pp. 408-409) The comments to the rules of professional conduct provide guidance on similar situations:

> [I]f the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective. 32:1.7 cmt. 22.

The overwhelming evidence demonstrates Paul had full disclosure and consented to the joint representation of himself and the borrowers. Paul and Hamer had been friends for decades. He had a close personal friendship with Hamer that included spending time together at outside of business related ventures. Paul was an expert and sophisticated investor. Former Supreme Court Justice Neumann noted that Paul is a "well-educated man that had a successful career in business" and provided sworn testimony that he did not use or seek investment advice from Hamer. (App. Vol. 2, p. 386).

Further, another of Hamer's expert witnesses, highly respected Attorney Gregory M. Lederer opined, "Paul was an experienced, successful businessman . . . intensely involved with his investments, both before and after investing." "Paul's conduct and declarations are consistent with a client who understands the consequences of disclosure and who is likely to consent." (App. Vol. 2, p. 393).

The assertions that Paul did not receive disclosure or consent to the multi-representation does not measure up to the mountains of evidence to the contrary. Mr. Hamer's disclosure of any potential conflict ensured that his conduct was in line with the rules of ethical conduct.

D. The Grievance Commission did not apply the appropriate law regarding the standard commercial transactions between Paul and Hamer.

The Commission provided an erroneous legal analysis as it relates Count II of the Board's complaint. First, the Commission erroneously places the burden on Hamer to prove he did not engage in an impermissible conflict of interest when the burden to prove violations rests with the Board. Second, the Commission failed to apply the correct law as it relates to business transactions with clients.

i. The Board has the Burden of Proof in Attorney Discipline Cases

The Commission erroneously placed the burden on Hamer to prove that he did not engage in a conflict of interest. While attorneys have a responsibility to abide that rules of professional conduct, it is the responsibility of the Board, -and the Board alone- to prove the violations.

In their findings the Commission stated, "The Iowa Supreme Court has long held the burden is on an attorney engaged in a business transaction with a client to show that he acted in good faith and made full disclosures." *Citing Comm. on Prof'l Ethics & Conduct of Iowa State Bar Ass'n v. Mershon*, 316 N.W.2d 895, 899 (Iowa 1982). The Commission's statement is grossly inaccurate and asserts a complete misinterpretation of law.

The Board is required to prove each and every ethical violation by a convincing preponderance of the evidence. *Nelson*, 838 N.W.2d at 532. The Supreme Court of the United States has noted that attorney discipline cases are quasi-criminal in nature. Accordingly, the respondent attorneys in such cases require similar protections as criminal defendants. *In re Ruffalo*, 390 U.S. 544 (1968). Of these protections, the burden of proof resting with the Board, the prosecuting body in these cases, in one of the most important protections.

The Commission erroneously cites the *Mershon* case to support their burden switching proposition. 316 N.W.2d 895. The *Mershon* case does not address the burden of a respondent attorney to disprove allegations in any capacity. *Id.* This case merely states that an attorney engaging in a business transaction with a client has a fiduciary duty to the client. This duty includes refraining from violating the rules of professional conduct. *Id.* at 899.

The same proposition can be carried over to any rule of professional conduct. All attorneys have an obligation to abide by all rules of professional conduct. This point is uncontroverted. However, it is always the responsibility of the Board to prove any such violations.[2]

The Commission's interpretation of the ruling in the *Mershon* case is completely erroneous and misguided. It is the responsibility of the Board to prove all violations by a convincing preponderance of the evidence. By 'flipping the burden' the Commission did not take in to account that the only testimony supporting these allegations was from Doug Paul, a witness that was not credible. In truth, the Commission's findings that the rules regarding business transactions with clients had been violated is buoyed only by erroneously placing the burden of proof on Hamer. For these reasons the Commission's ruling must be overturned.

ii. Paul and Hamer were engaged in standard commercial transactions.

The Commission also incorrectly applies controlling law related to business transactions with clients. Namely, the Commission entirely failed to

[2] There are instances where an attorney will carry the burden of proof on a defense to an alleged violation, such as the colorable future claim defense. *Iowa Supreme Court Attorney Disciplinary Bd. v. Guthrie*, 901 N.W.2d 493, 500 (Iowa 2017). No such defense is applicable in the context of these allegations.

acknowledge Doug Paul's expertise and experience as a private banker. The rules of professional conduct explicitly state that such transactions are permitted under the rules of professional conduct.

Count II, III, and IV all concern business transactions between Paul and Hamer. Iowa Rule of Professional Conduct 1.8(a) provides pertinent guidance for ethical concerns in such transactions.

Rule 1.8 cannot be read as a blanket prohibition against business transactions between a lawyer and the client. *Iowa Supreme Court Attorney Disciplinary Bd. v. Marks*, 814 N.W.2d 532, 538 (Iowa 2012). The comments providing guidance to rule 1.8 are particular helpful in the present circumstance. As comment [1] to Iowa Court Rule 32.1.8 governing conflicts of interest with current clients informs:

> **COMMENT**
>
> *Business Transactions Between Client and Lawyer*
>
> [T]he rule does **not** apply to standard commercial transactions between the lawyer and the client for products and services that the client generally markets to others, for example, **banking or brokerage services**, medical services, products manufactured or distributed by the client, and utilities' services. **In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable**.
>
> IA R. 32:1.8(cmt. [1])(emphasis added).

The comment directly applies to the relationship between Hamer and Paul. As noted, Paul is an experienced investor who routinely lent capital to

others on a consistent basis. When questioned how he understood his role in the investments he engaged in, Paul testified, "I understood it as **private banking**. I was lending money to businesses and individuals, and I also made some large investments in bigger companies." (App. Vol. 4, p. 238) (emphasis added). The overwhelming evidence supports that Doug Paul was an expert in the field of private banking.

First, Paul was inarguably successful in the majority of his investments. "The 20 or 21 loans that were involved during that period in two years, he made over -- well over a million dollars." (App. Vol. 4, pp. 419-420, 238). Paul's expertise and intelligence as a private banker was readily apparent. Hamer described Paul as "an incredibly successful businessman" and "a sophisticated investor". (App. Vol. 4, p. 431). Hamer noted, "There are different kinds of clients that you develop in a community like Iowa City, and sometimes there are some very, very bright people. Doug was on the high end of that bright schedule, and he was a very engaging and active person". (App. Vol. 4, p. 428).

It is uncontroverted Paul has had extensive experience in the private banking world dating back to 1988. (App. Vol. 4, pp. 351-352). His experience extends to transactions that were entirely independent of his relationship with Hamer. Paul himself testified that he undertook private loans

on his own during the time period he engaged in business transactions with Hamer (App. Vol. 4, pp. 352-356). Paul acknowledged in his testimony that Hamer did not have any role in negotiating any terms of the transactions. (App. Vol. 4, pp. 358-360) .

It is impossible for the drafters of the Iowa Rules of Professional Conduct to provide more explicit guidance on the interpretation of Rule 1.8 as it applies to the present circumstances. Paul was an experienced investor routinely engaging in what he testified as "private banking". The comment directly applies to the relationship between Hamer and Paul. For Paul, these types of investments could only be understood as "standard commercial transactions". The comment further states that a client who generally markets banking or brokerage services would not be applicable under the rule as "the lawyer has no advantage in dealing with the client". Such restrictions under the rule are "unnecessary and impracticable".

E. Hamer did not collect an excessive fee for his work in closing on the sale of Doug Paul's Buckle Down business.

Hamer never collected an excessive fee as alleged by Doug Paul and the Board in Count IV of the complaint. The lack of credibility of Doug Paul as a witness has been thoroughly discussed throughout this brief and the in the

Commission's findings. The incredulity of Paul's testimony is best highlighted by his testimony concerning the payment of Hamer's attorney fees for the sale of Paul's business, Buckle Down.

In April of 2004 Hamer helped Paul close on the sale of Paul's business, Buckle Down. The business sold for an astonishing value of more than $27,500,000.00. The Grievance Commission erroneously found that Hamer collected an excessive fee for his role in the closing of the sale. This finding is based exclusively on the completely incredible testimony of Doug Paul.

The evidence and testimony concerning the alleged bonus is most emblematic of the incredible and problematic nature of Paul's testimony. At the time of hearing, Paul testified that Hamer had "double-dipped" on a bonus because he had given him a loan to equal a $150,000 bonus Paul decided to award him, but at the same time he added $110,000 to the bill for a "bonus." Paul claimed that Hamer directed him to extend him a $1 million dollar loan at a reduced interest rate instead of a cash bonus that he would have to pay to his partners. (App. Vol. 1, pp 316-318). In fact, Paul testified to a detailed discussion, complete with a mathematical calculation, he claims occurred with Hamer:

> No, that was pretty specific. I understood what he was asking. A million dollars at 3 percent lower than he would have to pay elsewhere over five years, That would yield $30,000 a year for five years, which would equal $150,000.

> (App. Vol. 4, p. 318) (see also, App. Vol. 4, pp. 325-326, for further testimony regarding detailed mathematical discussion similar to the cited text).

Paul testified he had no complaints absent the fees! As outlined below, and taking note of the detailed nature of this sworn testimony, this testimony is clearly fabricated, and stands as characteristic of Paul's motivation to hurt Hamer in this matter. Starting with Paul's complaint filed with the Board, there is incontrovertibly a pattern of inconsistent, dishonest statements clearly intended to harm Hamer in this matter.

Paul's complaint, filed in 2013, makes absolutely no mention of any bonus or Hamer "double-dipping" on any bonus. However, in questioning with the Board's lawyer, Paul testified that his "first reaction" in February 2010 "was that [Hamer] had double-dipped on the bonus." (App. Vol. 4, p. 346). It is difficult to imagine that this issue, tantamount to theft, was somehow overlooked in a 7-page Complaint filed with the Board. A more probable explanation is that there was no double-dipping, and that this issue was concocted by Paul to harm Hamer. Paul's additional sworn testimony provides yet more support for this conclusion.

Thereafter, the Board filed a formal Complaint against Hamer. Therein, the Board alleges that Paul offered Hamer an $110,000 bonus for his work with the sale of Paul's business. (App. Vol. 1, p. 39). The Complaint further

alleges that Hamer declined the bonus, but made a counter-offer of a $1 million dollar loan at 2.5%. (App. Vol. 1, p. 39).

Less than a week prior to the formal trial of this matter, Paul provided sworn deposition testimony. In it, Paul testified that he offered Hamer an $110,000 bonus. At that time, Paul testified about a mathematical formula and discussion with Hamer that conflicts with his testimony at trial, and had never-before-appeared in this litigation:

> I think I made it up. It was—I don't think I arrived at it by any sensible calculation. Actually, I think I initially proposed $250,000, but I don't have any notes on that whole thing, but I would have—if I look at a million dollars in the interest being reduced, say the interest is four points lower than normal, then it would be 40,000 a year over five years would be $200,000.
>
> Sure, so I think the offer was actually $250,000. (App. Vol. 4, pp. 375-376; Deposition Tr. 56).

Paul's attempts to rationalize and support his oscillating testimony only further erode its credibility. (App. Vol. 4, pp. 374-377). As outlined above, at the time of trial, Paul presents yet another never-before-produced story about a $150,000 bonus. The bonus goes from non-existent in the complaint to the Board, to $110,000 in the Complaint against Hamer, to $110,000 in his deposition, to $250,000 clarification in his deposition, to $150,000 in his sworn testimony at trial of this matter. This sensational flip-flopping and storytelling can only be described as incredible!

The reality is that it was convenient for Paul to try and support his narrative by creating a mathematical formula that, inherently, needed to fluctuate as it could not logically or consistently be applied to prior sworn and attested to statements. Paul's testimony, sworn and in signed form on his Complaint, is clearly variable depending on what version will best support his self-interested narrative. His story could have been easily validated by simply checking the check register related to the payment. This simple step was never taken. In conclusion, the 'bonus' was a payment suggested by Paul himself! Any notion that it was excessive is not supported by any credible evidence.

The Commission based their findings that Hamer collected an excessive fee exclusively on the highly inconsistent testimony of a witness they deemed not credible. The Board did not carry their burden of proof and the count should be dismissed.

F. Mitigating Factors

No sanction should be entered in this case. In the event a sanction is considered, the Commission must acknowledge mitigating factors.

In determining the appropriate sanction in an attorney disciplinary case the Grievance Commission considers mitigating factors. *Iowa Supreme Court Attorney Disciplinary Board v. Boles*, 808 N.W.2d 431, 442 (Iowa 2012).

Hamer's service and involvement in his community is a strong mitigating factor requiring a minimal sanction.

Community service is a "significant mitigating factor" to be considered by the Commission. *Id.* Hamer has provided a remarkable record of service, of which a sample was presented to the Commission at hearing. (App. Vol. 4, pp. 415-416). Hamer has volunteered throughout the Iowa City Community. His service includes serving as a the founding president and member of the Iowa City Community School District Foundation for over 35 years, providing pro bono legal service to the Newman Catholic Student Center Singers, and fund raising for numerous non-profit groups, including aiding the Iowa City Community Theater.

Hamer has also served as a volunteer speaker and a teacher at the University in the Entrepreneurial program for graduate and undergraduate students and for various clubs and the Bar. He has also been a member of the Iowa State Bar Association Trade Regulations Section. I was twice the chair of this section.

CONCLUSION

The Board has the sole burden to prove ethical violations by a convincing preponderance of the evidence. Several attorneys have reviewed the facts of this case. Neither expert witnesses, Attorney Gregory Lederer,

nor Justice Linda Neuman have been convinced an ethical violation has occurred, nor the standalone testimony of Doug Paul, as incredible as it was, does anything to change that. Nothing presented before the Grievance Commission is sufficient to carry the Board's burden in this matter. Hamer has not committed any violation of the rules of professional conduct. The Court should find the Board failed to carry their burden on all counts.

APPELLANT'S STATEMENT OF DESIRE TO BE HEARD IN ORAL ARGUMENT

Appellant hereby states his desire to be heard in oral argument pursuant to Iowa Rule of Appellate Procedure 6.21(1).

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

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